HJ ZAINIE ABDUL AUCASA A

v.

YABI YANGKAT

HIGH COURT SABAH & SARAWAK, KOTA KINABALU B
CHEW SOO HO J
[JUDICIAL REVIEW NO: BKI-13JR-6-3-2013]
31 OCTOBER 2013

ADMINISTRATIVE LAW: *Judicial review - Certiorari and mandamus - Application for - Order to quash respondent's decision in refusing to forward applicant's appeal to Environmental Appeal Board ('Board') - Whether applicant deprived of rights to be heard - Whether there was breach of natural justice - Whether respondent should perform his public duty by allowing applicant to appeal to Board - Whether applicant an aggrieved person - Environment Protection Enactment 2002, ss. 12(2), 13, 46(2) & 47(a)* C D

Laser Plus Design Sdn Bhd ('the developer'), proposed to develop its land into a condominium under a project ('the proposed project'). For the approval of the development plan of the proposed project, the Kota Kinabalu City Hall required the developer to obtain an Environmental Impact Assessment ('EIA') approval from the director of Sabah Environment Protection Department ('the respondent'). However, since the proposed activities to be carried out in the proposed project did not come within the prescribed activities as stated in the First and Second Schedule of the Environment Protection (Prescribed Activities) (Environmental Impact Assessment) Order 2005 ('the Order') enacted under s. 12(2) of the Environment Protection Enactment 2002 ('the Enactment'), the respondent did not require the EIA to be submitted by the developer for the said project on that land. The respondent nevertheless considered the EIA report under s. 13 of the Enactment as a report on non-prescribed activities and this EIA report was duly approved. Subsequent to that, the president of the Sabah Wetlands Conservative Society ('the applicant'), submitted an appeal under s. 47(a) of the Enactment for the matter to be referred to the Environmental Appeal Board. The respondent contended that the approval of the said EIA report under s. 13 of the Enactment did not fall within any of the matters appealable under s. 47 of the Enactment. It was further contended that the applicant was not E F G H I

an aggrieved person. The applicant filed this judicial review for, *inter alia*, an order of *certiorari* to quash the decision of the respondent on a breach of the principles of natural justice when the respondent deprived the applicant's rights to be heard before the Environmental Appeal Board formed under s. 46(2) of the Enactment and an order of *mandamus* for the respondent to perform his public duty by allowing the applicant to appeal to the Environmental Appeal Board under s. 47(a) of the Enactment.

Held (dismissing application with costs):

(1) Only when a person is aggrieved by situations provided under s. 47(a), (b) or (c) of the Enactment, may an appeal be submitted to the director and the director shall then forward such appeal to the chairman of the appeal board. Once any of the situations in (a), (b) or (c) arises where an appeal is submitted to the director, the role of the director is mandatory that he shall transmit the appeal to the chairman of the appeal board. Hence, pursuant to s. 47(a) of the Enactment, it was for the applicant to show that he was aggrieved by any of the decisions of the director made under s. 12 or s. 17 or by an abatement notice issued under s. 37 of the Enactment. (para 7)

(2) The proposed development or construction of the 31 storey condominium involved land with an area of 2.74 hectares which was less than the 50 hectares or more as provided in para. 3(i) of the Second Schedule of the Order while the slope gradient was between 4-6 degrees whereas para. 3(iii) of the Second Schedule of the Order provides for hills with slopes having gradient of 20 degrees or more. Hence, the proposed project did not fall within the categories of prescribed activities within the meaning of s. 12 of the Enactment. (para 10)

(3) The decision made by the director was therefore a decision under s. 13 of the Enactment. Since the decision of the director was made under s. 13 of the Enactment, it was not a decision that could be categorised under s. 47(a) or (b) or (c) of the Enactment to be appealable by any person who is aggrieved by such decision or abatement notice. It would be in contravention of a clear provision of the Enactment under s. 47 if the director/respondent were to forward such purported appeal by the applicant to the Environmental Appeal Board. Thus, the respondent's refusal to forward the

applicant's purported appeal was in compliance with the law and could not be held to have erred in law or breached his public duty in the circumstances of this case. (para 10)

Case(s) referred to:

Ahmad Tajudin Ishak v. Suruhanjaya Pelabuhan Pulau Pinang [1997] 2 CLJ 225 CA ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Legislation referred to:

Environment Protection (Prescribed Activities) (Environmental Impact Assessment) Order 2005, First Schedule, Second Schedule, paras. 3(i), (ii), (iii), 9(i)(b), (ii)

Environment Protection Enactment 2002, ss. 12(1), (2), (3), (4), (5), (6), 13, 17, 37, 46(2), 47(a), (b), (c)

Federal Constitution, art. 8(1)

For the applicant - Mohd Al Hafidz; M/s Ngui & Assocs, Advoc

For the respondent - Dayangku Fazidah Hatun Pg Bagul (Mohd Ikhwan with her); State Legal Officer, Sabah

Reported by Suhainah Wahiduddin

JUDGMENT

Chew Soo Ho J:

Introduction

[1] Laser Plus Design Sdn Bhd ("the Developer") proposed to develop its land held under CL 0150005991 at Jalan Bukit Bendera, Kota Kinabalu into a condominium under its Project known as "Proposed Condominium Development on CL 0150005991 at Jalan Bukit Bendera Kota Kinabalu, Sabah" ("the proposed Project"). For the approval of the development plan of the proposed Project, the Kota Kinabalu City Hall required the Developer to obtain an Environmental Impact Assessment ("EIA") approval from the respondent. However, since the proposed activities to be carried out in the proposed Project do not come within the "prescribed activities" as stated in the first and second Schedule of the Environment Protection (Prescribed Activities) (Environmental Impact Assessment) Order 2005 ("the Order") enacted under s. 12(2) of the Environment Protection Enactment

2002 ("the Enactment"), the respondent did not require the EIA to be submitted by the Developer for the said Project on that land. Under the Second Schedule of the Order, only if the proposed development for housing covering an area of 50 acres or more, the earthwork of 40,000 m^3 or more and for development of housing on hills with slopes having gradient of 20 degrees or more that the respondent would be required to approve the EIA report for the proposed Project under s. 12 of the Enactment. The development of the proposed Project in this respect only involves an area of 2.74 hectares, 38,000 m^3 of earthwork and hill slopes having gradient between 4 degrees - 6 degrees only. Hence they do not fall under the "prescribed activities" within the schedules of the Order to require respondent's approval under s. 12 of the Enactment. Respondent nevertheless considered the EIA report under s. 13 of the Enactment as report on non-prescribed activities and on 12 June 2012, this EIA report was duly approved. Subsequent to that, applicant submitted an appeal on 13 August 2012 under s. 47(a) of the Enactment for the matter to be referred to the appeal board. Respondent contended that the respondent's approval of the said EIA report under s. 13 of the Enactment does not fall within any of the matters appealable under s. 47 the Enactment. It was further contended that the applicant was not an aggrieved person and the appeal was made out of time.

[2] The applicant is the President of the Sabah Wetlands Conservative Society and filed this judicial review for *inter alia* an order of *certiorari* to quash the decision of the respondent *vide* letter dated 13 December 2012 on a breach of the principles of natural justice when the respondent had deprived the applicant's rights to be heard before the Environment Appeal Board formed under s. 46(2) of the Enactment as an "aggrieved person" and an order of *mandamus* for the respondent to perform his public duty by allowing the applicant to appeal to the Environment Appeal Board under s. 47(a) of the Enactment. The grounds relied on are *inter alia* the denial of the applicant of the right of being heard and the right to appeal before the Environment Appeal Board against the decision of the respondent in rejecting applicant's appeal for the reason that applicant, Sabah Wetlands Conservation Society is not an "aggrieved person" to appeal under s. 47(a) of the Enactment. In addition, the applicant listed out the grounds against the proposed development or construction of a 31 storey condominium on the alleged detrimental or adverse effect

on the ridge conservation areas as well as on the mangrove eco-system with environmental pollution and disruption of the habitat around the Kota Kinabalu Wetlands (formerly known as Kota Kinabalu City Bird Sanctuary). It was also alleged that the proposed development will contravene the Sabah state government's intention of declaring the Kota Kinabalu Wetlands as a conservation site and a cultural heritage under the Sabah Cultural Heritage (Conservation) 1997 Enactment.

Findings Of Court

[3] The law on judicial review is trite that judicial review is not an appeal from a decision but a review of the manner in which the decision was made and not the merits of the case. In brief, the function of the High Court in judicial review is supervisory in nature and that the court is only to consider the decision making process but is not to consider whether the decision on the merits of the case was fair and reasonable; see *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1992] 2 CLJ 881; [1991] 1 CLJ (Rep) 159; [1991] 1 MLJ 417, 419 SC. However, since *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 FC, exceptions have surfaced that the court in exercising its supervisory power may review the merits or facts of the case when there is illegality or irrationality or unproportionality.

[4] From the facts and affidavit evidence in this case, the contention and principal ground upon which applicant is seeking judicial review is on the refusal of the respondent to allow the applicant to appeal against the approval of the EIA report of the proposed Project of the Developer. By such refusal, applicant contended that their right to be heard and their right to appeal are being deprived of. Consequently, it was contended that the administrative action of the respondent had violated art. 8(1) of the Federal Constitution on the equality before the law which constitutes unfair discrimination citing *Ahmad Tajudin Ishak v. Suruhanjaya Pelabuhan Pulau Pinang* [1997] 2 CLJ 225 CA on the essential elements of unfair discrimination.

[5] The respondent's contention is basically premised on the statutory provisions under the Enactment and the Order as recapitulated above and the interpretation thereof on the facts of the instant case.

[6] From what had been deposed and submitted by both parties herein, I do not find any issue or evidence of unfair discrimination, or a violation of art. 8(1) of the Federal Constitution. The question is only whether the provisions of the Enactment and/or the Order were correctly invoked and construed or interpreted when the respondent had allegedly rejected or refused to forward or refer the appeal by the applicant to the Environment Appeal Board under s. 47(a) of the Enactment. Other grounds relating to the impact and/or the detrimental and/or adverse effect of the proposed development or construction of 31 storey condominium on the said land would be the merits of the case or the appeal and would have no significance in this judicial review since there is no evidence of illegality, irrationality or unproportionality which are the exceptions to warrant such consideration. Section 47 of the Enactment provides:

> 47 Any person who is aggrieved by -
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> (a) any decision of the Director under section 12; or
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> (b) any decision of the Director under section 17; or
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> (c) an abatement notice issued under section 37;
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> may within 30 days from the date of the final decision of the Director made under paragraphs (a), (b) or (c), submit an appeal to the Director who shall forward such appeal to the Chairman of the Appeal Board.

[7] Reading s. 47 above, I find it amply clear that only in situation (a) or (b) or (c) as provided in this section where a person is aggrieved of that an appeal may be submitted to the director and the director shall then forward such appeal to the chairman of the appeal board. It is clear to me that once any of the situation (a) or (b) or (c) arises where an appeal is submitted to the director, the role of the director is mandatory that he shall transmit the appeal to the chairman of the appeal board. Hence, pursuant to s. 47(a) of the Enactment, it is for the applicant to show that he is aggrieved by any of the decision of the director made under s. 12 or made under s. 17 or by an abatement notice issued under s. 37 of the Enactment.

[8] The applicant is attempting to contend that the decision in refusing the applicant's appeal to the Environment Appeal Board by the respondent was pursuant to s. 12 of the Enactment while the respondent contends that such decision was made under s. 13

of same Enactment. In order to appreciate these 2 provisions of the Enactment, it must be distinguished in the first place whether an activity which is to be considered by the respondent for the protection of environment comes within the "prescribed activities" in order for the provisions of s. 12, 12(1) to 12(6) of the Enactment to be invoked. If the activity does not fall within the "prescribed activities" under s. 12, an environment impact assessment report, *inter alia*, may still be required by the director to be submitted for consideration under s. 13 of the Enactment. Hence, a decision made by the director relating to non-prescribed activities will be pursuant to s. 13 of the Enactment and such decision will not be subject to appeal under s. 47(a) *(supra)*. What are "prescribed activities" within s. 12 of the Enactment? Pursuant of s. 12(2) of the Enactment, Environment Protection (Prescribed Activities) (Environmental Impact Assessment) Order 2005 ('the Order') was made to provide for such activities which are contained in the First and Second Schedules of the order. The First Schedule provides the "List of Prescribed Activities Requiring Proposal for Mitigation Measures" which is not relevant in the instant case. Second Schedule relates to and provides the "List of Prescribed Activities Requiring Environment Impact Assessment Report" which is the EIA report which the respondent had approved and the applicant sought to appeal to the Environment Appeal Board but was rejected. The relevant paragraph in this Second Schedule of the Order which relates to "Housing, Commercial and Industrial Estates" provides:

> 3. Housing, Commercial and Industrial Estates:
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> (i) Development of housing, commercial or industrial estates covering an area of 50 hectares or more;
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> (ii) Conversion of wetland forests into housing, commercial or industrial estates covering an area of 30 hectares or more; or
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> (iii) Development of housing, commercial or industrial estates on hills with slopes having gradient of 20 degrees or more".

[9] Reading para. 3 of the Second Schedule of the Order with s. 12 of the Enactment, "prescribed activities" as provided therein para. 3 above are referring to only the three categories as stipulated in paras. 3(i), (ii) and (iii) above.

[10] The proposed development or construction of the 31 storey condominium as the facts show, involves land with an area of 2.74 hectares which is less than the 50 hectares or more as provided in para. 3(i) of the Second Schedule of the Order while the slope gradient in respect of the proposed Project is between 4 degrees – 6 degrees whereas para. 3(iii) of the Second Schedule of the Order provides for hills with slopes having gradient of 20 degrees or more. Hence the proposed Project in the instant case does not fall within the categories of "prescribed activities" within the meaning of s. 12 of the Enactment since the other category under para. 3(ii) involving "conversion of wetland forests into housing" is not relevant to the proposed Project. The respondent had also referred to para. 9(i)(b) of the same Second Schedule and submitted that the earthwork involved in the proposed Project was 30,800 cubic meter while para. 9(ii) stipulates the earthwork with a volume of 40,000 cubic meters or more. A scrutiny of para. 9 of the Second Schedule shows that it in fact relates to "Quarries" and is unrelated to the proposed Project which is "housing development". Thus, I do not find the necessity to look into para. 9 which is not relevant in the instant case. However, even assuming that it does involve earthwork as all development project does and paras. 9(i)(b) and 9(ii) pertaining to earthwork need to be considered, the fact that the volume of earthwork involved in the proposed project falls short of the minimum cubic meters of the earth as stipulated under para. 9(ii) of the said Second Schedule, renders the proposed project not to be construed as the "prescribed activities" within s. 12 of the Enactment. Consequently, the only provision for the respondent to consider and approve or reject an EIA report can only be under s. 13 of the Enactment which provides:

> 13. The Director may require an environmental impact assessment report or a proposal for mitigation measures to be submitted by an applicant for any activity not prescribed under section 12 if the Director is of the opinion that such development activity has or is likely to have an adverse effect on the environment.

The decision made by the director must therefore be a decision under s. 13 of the Enactment. Since the decision of the Director was made under s. 13 of the Enactment it is not a decision that can be categorised under ss. 47(a) or (b) or (c) of the Enactment to be appealable by any person who is aggrieved by such decision or abatement notice. I find that it would be in contravention of a

clear provision of the Enactment under s. 47 if the director/respondent were to forward such purported appeal by the applicant to the Environment Appeal Board. The director's role under s. 47, to reiterate, is that he "shall forward such appeal to the Chairman of the Appeal Board". For that, I find that there is a legal duty and obligation on the director to ensure that an appeal must satisfy one of the situations in ss. 47(a) or (b) or (c) of the Enactment to satisfy the prescribed legal requirement which renders the matter appealable before such appeal "shall be forwarded" to the appeal board. When the applicant's purported appeal fails to satisfy any of the three situations in s. 47, I hold that the respondent's refusal to forward the applicant's purported appeal is in compliance with the law and cannot be held to have erred in law or breached his public duty in the circumstances of this case.

[11] For the foregoing reasons, I do not find any error in the decision process undertaken by the respondent in making his decision as complained by the applicant. Therefore, this application (encl. 15) is dismissed with costs of RM3,000.